It appears, however, that the option contract between NCNB and Heritage was never implemented, but that, instead, the bankruptcy court confirmed another plan of reorganization. (Order of Confirmation in Oklahoma City Broadcasting (dated March 22, 1981).) Under this plan, Ted Baze, a minority shareholder who had actually been responsible for the day-to-day operations of KGMC(TV) acquired control of the licensee. See Seraphim Corporation, 4 FCC Rcd at 8820-21. This plan "enable[d] Baze, who ha[d] been responsible for KGMC(TV)'s day-to-day operations from the station's inception, to continue broadcast service in the public interest." Id. at 8820.

Had NCNB held a valid security interest in the FCC license, it appears that it would have forced a foreclosure sale to a competing television station, as a result of which television station KGMC(TV) would have been taken off the air. Instead, the station was ultimately sold to an experienced broadcaster, and service to the people of Oklahoma City was preserved.16/

In view of the final outcome of Oklahoma City Broadcasting, the FCC's existing law appears in that case to have served the public interest well by preserving the maximum number of media voices in the community. If, as most

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16/ The bankruptcy court observed that it did "not believe the best interest of the viewers in the Oklahoma City area will be served if [KGMC] is taken off the air," but noted that this issue was beyond its jurisdiction. Oklahoma City Broadcasting, 68 R.R.2d at 95.

commenters argue, the bankruptcy court in Oklahoma City Broadcasting incorrectly allocated value to the FCC license (see Comments of Ameritrust, Chemical, New Bank of New England at 7 n.2), then the remedy is for them to seek correction in the bankruptcy courts. The FCC is not an appellate forum for the reversal of bankruptcy court judgments that certain creditors find unfavorable. Accordingly, it is not necessary for the Commission to make an unnecessary and radical change in its law, a law demonstrably enhancing the public interest.

## IV. Contrary to Petitioner's and Others' Arguments, Courts Do Not Uniformly Permit the Existence of Security Interests in Analogous Licenses.

Petitioner and several commenters attempt to analogize FCC licenses to other governmental licenses, particularly liquor licenses. MPAA doubts seriously that analogous public policy considerations underlie the regulation of both FCC broadcast and liquor licenses. Moreover, it should be noted that not all courts have held that liquor licenses or other governmental licenses or privileges are properly subject to a security interest.17/

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17/ For example, in In re Eagles Nest, Inc., 57 Bankr. 337 (Bankr. N.D. Ind. 1986), the court concluded that an Indiana liquor license could not be the subject of a security interest. In that case, the court weighed the policies behind the Indiana Uniform Commercial Code and Indiana Alcoholic Beverages Act and determined that it could give full effect to both laws by allowing the

(Footnote continued on next page)

Similarly, many of the cases cited by petitioner and supporting commenters do not specifically hold that a security interest could be taken in the relevant license or permit.[18] For example, the courts in In re American Central Airlines and In re McClain Airlines, Inc. merely held that an FAA landing slot may be considered an asset of the bankrupt's estate, an

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(Footnote continued from previous page)

[17] debtor's interest in the permit to be recognized as property of the bankrupt's estate, yet not recognizing the permittee's interest in the license as property within the scope of the Indiana UCC. The court thus distinguished between property of the estate and property which may be subject to a security interest, a distinction also made under existing law with respect to FCC licenses. See LaRose v. F.C.C., 494 F.2d 1145, 1148 (D.C. Cir. 1974).

Furthermore, while some courts have held that a certificate of public convenience and necessity issued by the ICC is subject to a chattel mortgage, e.g., In re Rainbo Express, Inc., 179 F.2d 1 (7th Cir. 1950), cert. denied, 339 U.S. 981 (1950), at least one court has held that a similar license, a Massachusetts Department of Public Utilities Irregular Route Common Carrier Certificate, cannot properly be the subject of a security interest. See In re L & K Transportation Co., Inc., 8 Bankr. 921 (Bankr. D. Mass. 1981) (concluding that an Irregular Route Common Carrier Certificate is not, as a matter of Massachusetts law, property or a right of property, but is a privilege).

[18] E.g., In re American Central Airlines, Inc., 52 Bankr. 567 (Bankr. N.D. Iowa 1985); In re McClain Airlines, Inc., 80 Bankr. 175 (Bankr. D. Ariz. 1987); In re Gull Air, Inc., 890 F.2d 1255 (1st Cir. 1989); Barutha v. Prentice, 189 F.2d 29 (7th Cir. 1951), cert. denied, 342 U.S. 841 (1951); In re St. Louis South Parks II, Inc., 111 Bankr. 260 (Bankr. W.D. Mo. 1990).

approach that is consistent with the FCC's current law with respect to its licenses, as indicated above.[19/]

Morrison & Foerster also contends that certain "federal quasi-governmental entities have recently modified their regulatory regimes along similar lines" to the change proposed by Hogan & Hartson. (See Morrison & Foerster at 17.) According to Morrison & Foerster, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") now permit the grant of security interests in mortgage servicing rights granted by these entities. The documents attached by Morrison & Foerster to its comments, however, indicate that Fannie Mae imposes extremely strict conditions upon the grant of such a security interest: (1) Fannie Mae must give its prior approval of each transaction at least 30 days in advance of the proposed effective date; (2) such a security interest may be granted only for limited purposes; (3) the security agreement must contain certain

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19/ See n.17 supra. Furthermore, Hogan & Hartson incorrectly asserts that the Court of Appeals in In re Gull Air, Inc. held that "an entity's 'possesory interest [in the slots] must constitute property of the estate.'" Petition at 21. In fact, the court in Gull Air explicitly stated that because the bankrupt's interest in the landing slots had been withdrawn, it "need not decide the issue of whether a carrier's proprietary interest in an arrival or departure slot constitutes 'property of the estate' within the meaning of the Bankruptcy Code." 890 F.2d at 1261, n. 8 (emphasis added). The court simply held that the FAA grants carriers a limited proprietary interest in the landing slots. Id. at 1260. Moreover, the Gull Air case did not involve the question of whether an airline may grant a security interest in landing slots.

required provisions; and (4) the secured creditor must provide a copy of any recorded financing statement to the appropriate Fannie Mae regional office. Furthermore, Fannie Mae continues to prohibit the grant of a security interest in certain types of servicing rights agreements, e.g., agreements for multifamily mortgages. (See Morrison & Foerster Comments at Attachment B.) No apparent public interest would be advanced by a change in FCC law that might necessitate similar increased recordkeeping and regulatory oversight burdens.[20/]

## VI. Conclusion

For the foregoing reasons, MPAA submits that the public interest is best served by the denial of Hogan & Hartson's Petition for Declaratory Ruling.

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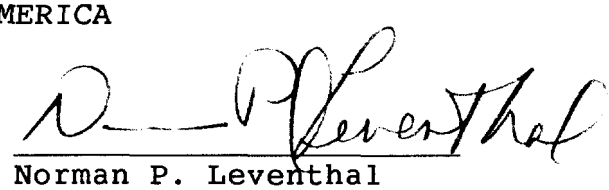
20/ Finally, MPAA notes that commercial licensors or franchisors also restrict the ability of their licensees or franchisees to grant security interests in the relevant license or franchise. Morrison & Foerster notes that the National Football League ("NFL") has only recently permitted its team owners to grant a security interest in their NFL franchises. (See Morrison & Foerster Comments at 17 n. 19.) Even then, no foreclosure sale can take place without the prior approval of the NFL. See id. MPAA notes that the NFL has only 28 teams to regulate. In contrast, the McDonald's Corporation, which like the FCC regulates thousands of franchisees, apparently prohibits the grant of security interests in its franchise agreements. See Capital Bank of New York v. McDonald's Corp, 625 F Supp. 874, 876 & 880 (S.D.N.Y. 1986). Although MPAA does not intend to analogize the FCC to McDonald's, it notes that there are valid policy reasons why the grantors of franchises (or licenses) prohibit the grant of security interests in their licenses.

The petition is only supported by certain banks and lending institutions, who faced with the difficulties of an economic recession, now seek to enhance their security interests in broadcast stations--and by a handful of law firms, who appear to have no direct interest (at least they have disclosed none) in this proceeding. It is not supported by any broadcast licensee.

MPAA also notes that while it has confined its comments to the effect of the proposed change on broadcast licenses, some of the commenters seek a change in the law with respect to the grant of a security interest in other FCC licenses as well. The Commission should cautiously assess the impact of a change in the law on these services, too. Before the Commission concludes that some change may be warranted, it would appear prudent to initiate a notice of inquiry to solicit comment from those licensees and their creditors as well as from broadcasters, before embarking upon a wholesale financial restructuring of the U.S. communications industry.

Respectfully submitted,

MOTION PICTURE ASSOCIATION
OF AMERICA

By: 

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Its Attorneys

# APPENDIX A

# Banks shouldn't hold licenses

Some of the country's leading banks are urging the Federal Communications Commission to give them the right to use TV and radio station licenses as security for loans to broadcasters.

It's an idea that, quite correctly, should cause station owners to react with alarm.

Traditionally, the FCC has said money lenders can't have security interests in FCC licenses, which the commission long has regarded as public interest properties. Lenders can hold a station's physical plant as collateral, but not the license itself.

That has caused some difficulties for the banks. When broadcasters are forced into bankruptcy, lenders often recover only a fraction of the money owed to them because they have to stand in line with other creditors for reimbursement, which usually stems from liquidated assets.

What the banks are now looking for, in essence, is the ability to quickly and fully recoup the value of a station if it defaults on its loan.

Among those supporting the security proposal are such well-known institutions as Chemical Bank, Bank of America, Chase Manhattan and the New Bank of New England, the successor to the failed Bank of New England.

It's not surprising that money lenders have taken this latest tack. Many of the media deals that they helped to finance in the 1980s were based on unrealized cash flow growth.

More recently, the steady decline in advertising revenues has impaired many broadcasters' ability to repay bank debt.

While we sympathize with the financial plight of the banks (not to mention the stations), the idea of allowing banks to use licenses as security poses several problems.

Station licenses are indeed something of a sacred commodity. They are the link to the public airwaves and they carry special responsibilities with them.

The thought of a financial institution suddenly having oversight of those responsibilities should make broadcasters and the FCC shudder.

The banks maintain that they would not exert undo control over the license; they just want their money back.

But strange things happen when financial disaster looms. If the FCC changes the rules, it would raise the possibility of a bank, with no more stake in broadcasting than getting a quick financial return, suddenly calling the shots on a struggling station's programing, news and personnel decisions.

Secondly, if the banks really don't want to control the stations, then they shouldn't be given any power over licenses in the first place. Inherent in the use of a license is the responsibility to provide programing that meets community needs, something that the banks concede they have no interest in doing.

This licensing issue has been raised in the past, and the FCC has responded with its own concerns about preserving its right to review and approve all ownership changes.

As the banks point out, any change in a license's ownership would still have to be approved by the FCC under their proposal.

Yet their plan could open the door for players who are more interested in using licenses solely to secure an investment rather than to meet the public interest.

Financial institutions should not be given clout over the public airwaves.#

# APPENDIX B

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

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In re:

TAK COMMUNICATIONS, INC.,

CHAPTER 11
CASE NO. MM11-91-00031

Debtor.

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NEW BANK OF NEW ENGLAND, N.A. individually and as agent for CHEMICAL BANK, THE NEW CONNECTICUT BANK AND TRUST COMPANY, N.A., HELLER FINANCIAL, INC., THE BANK OF NOVA SCOTIA, AMERITRUST COMPANY NATIONAL ASSOCIATION and NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION,



Plaintiff,

v.

Adversary Proceeding
No. 91-

TAK COMMUNICATIONS, INC.,

Defendant.

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COMPLAINT TO DETERMINE VALIDITY OF LIEN

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In this adversary proceeding, plaintiff seeks a judgment of this Court pursuant to Bankruptcy Rules 7001(2) and 7001(9) declaring the validity of a lien.

Jurisdiction and Venue

1. This court has jurisdiction under 28 U.S.C. §§1334, 157(a), 157(b)(1) and 157(b)(2)(K). Venue is proper in this Court under 28 U.S.C. §1409(a). This is a core proceeding.

## Parties

2. Plaintiff New Bank of New England, N.A. ("NBNE") is a national banking association with a place of business at 28 State Street, Boston, Massachusetts.

3. Defendant Tak Communications, Inc. ("TakCom") is the debtor in this case under Chapter 11 of Title 11, United States Code ("Bankruptcy Code").

## Count One

(Declaration of Validity of Lien)

4. TakCom, then known as Tak-WGRZ, Inc., and a corporation then known as Tak Communications, Inc. ("Old TakCom") entered into a Revolving Credit Agreement dated as of September 20, 1988 (the "Loan Agreement") with Chemical Bank ("Chemical"), Bank of New England, N.A. ("BNE"), The Connecticut Bank and Trust Company, N.A. ("CBT"), The Bank of Nova Scotia ("Scotia") and Norwest Bank Minnesota, National Association ("Norwest"). A copy of the Loan Agreement is attached hereto and incorporated herein as Exhibit A.

5. The Loan Agreement made available a secured line of credit up to $175,000,000.

6. Under the Loan Agreement and the Security Documents (as that term is defined in Section 1.8 of the Loan Agreement), BNE was appointed agent for various purposes, including the exercise of rights, powers and remedies under the Security Documents.

7. On September 20, 1988, TakCom and Old TakCom issued Revolving Credit Notes under the Loan Agreement to Chemical, BNE, CBT, Scotia and Norwest.

8. Subsequent to the initial closing under the Loan Agreement, BNE made a partial assignment of its Revolving Credit Note to Ameritrust Company National Association ("Ameritrust"), Chemical made a partial assignment of its Revolving Credit Note to Heller Financial, Inc. ("Heller") and Ameritrust and Heller became parties to the Loan Agreement. In connection therewith, the original Revolving Credit Notes issued to BNE and Chemical were cancelled and new Revolving Credit Notes were issued to BNE, Chemical, Ameritrust and Heller.

9. In a series of transactions occurring on various dates after September 20, 1988, Old TakCom and certain other affiliated corporations, including WGRZ Acquisition Corp. and WGRZ Television Corporation, were merged with and into TakCom.

10. As of January 3, 1991, the date on which TakCom filed its petition for relief under Chapter 11, TakCom was indebted on Revolving Credit Notes issued under the Loan Agreement and outstanding on that date (the "Notes") in the aggregate principal amount of $168,800,000. On that date, TakCom was also indebted on the Notes in the aggregate amount of $9,042,499.79 for accrued unpaid interest, as well as for certain fees and expenses. Copies of the Notes are attached hereto and incorporated herein as Exhibit B.

11. Pursuant to Section 1.8 of the Loan Agreement, TakCom and Old TakCom entered into Security Agreements dated as of

September 20, 1988 (the "Security Agreements") with BNE, individually and as agent for the lender parties to the Loan Agreement. The Security Agreements secure the obligations of TakCom under the Notes and the Loan Agreement. Copies of the Security Agreements are attached hereto and incorporated herein as Exhibit C.

12. On January 6, 1991, the federal Comptroller of the Currency ("OCC") closed BNE and CBT and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver.

13. Subsequently, the FDIC as receiver assigned the Revolving Credit Notes issued to BNE and CBT, together with their rights and powers under the Loan Agreement and the Security Documents, including the Security Agreements, to NBNE and New Connecticut Bank and Trust Company, N.A. ("NCBT"), new national banking associations chartered by OCC. NBNE and NCBT are wholly owned by the FDIC.

14. As of the date hereof, the Notes are held by NBNE and by Chemical, NCBT, Norwest, Scotia, Ameritrust and Heller (collectively with NBNE, the "Banks"). NBNE is authorized by the Loan Agreement to act as agent for Chemical, NCBT, Norwest, Scotia, Ameritrust and Heller.

15. Prior to January 3, 1991, TakCom operated six television stations and three radio stations (the "Stations") under licenses and authorizations granted by the Federal Communications Commission which are listed in Schedule 3.5 to the Loan Agreement and under renewals, extensions, or modifications thereof (the "FCC Licenses").

16. Upon the filing of TakCom's Chapter 11 petition, the rights of TakCom in the FCC Licenses and its rights under §310(d) of the federal Communications Act of 1934 (the "Communications Act"), 47 U.S.C. §310(d), became property of TakCom's estate.

17. TakCom continues to operate the Stations as debtor in possession.

18. The Security Agreements expressly state that they grant security interests in TakCom's and Old TakCom's rights under all present and future authorizations, permits, licenses and franchises issued, granted or licensed to TakCom and Old TakCom for the construction, installation or operation of television or radio broadcast stations and in general intangibles.

19. TakCom's rights under the FCC Licenses and its rights under §310(d) of the Communications Act are general intangibles within the meaning of Mass. Gen. L. c. 106, §9-106, Wis. Stat. §409.106 and Va. Code §8.9-106.

20. At all relevant times, TakCom had more than one place of business and its chief executive office was located in Vienna, Virginia or Madison, Wisconsin.

21. Financing statements covering TakCom's and Old TakCom's rights under all present and future authorizations, permits, licenses and franchises issued, granted or licensed to TakCom and Old TakCom for the construction, installation or operation of television or radio broadcast stations and their general intangibles naming BNE, individually and as agent, as secured party and naming TakCom and Old TakCom as debtors were filed with the Secretary of State of Wisconsin, the Virginia Corporation

Commission and the Clerk of Fairfax County, Virginia, on and after September 2, 1988, and more than one year prior to January 3, 1991. Those financing statements remain effective and on file.

22. All of the acts required under the Uniform Commercial Code as enacted in Massachusetts, Wisconsin and Virginia for the perfection of the security interest granted by the Security Agreements in TakCom's rights under the FCC Licenses and its general intangibles were completed more than one year before January 3, 1991.

23. NBNE, individually and as agent for the Banks, holds a valid and perfected security interest in TakCom's rights under the FCC Licenses and in TakCom's rights under §310(d) of the Communications Act.

24. The security interest held by NBNE in TakCom's rights under the FCC Licenses and its rights under §310(d) of the Communications Act constitutes a lien on property in which TakCom's estate has an interest within the meaning of §506(a) of the Bankruptcy Code.

## Prayer for Relief

WHEREFORE, NBNE prays this Court to enter a judgment against TakCom:

(a) declaring that (i) NBNE, individually and as agent for the Banks, has a valid and perfected security interest in TakCom's rights under the FCC Licenses and under §310(d) of the Communications Act, and (ii) said security interest constitutes a

lien on property in which TakCom's estate has an interest within the meaning of §506(a) of the Bankruptcy Code; and

(b) awarding NBNE, individually and as agent for the Banks, such other and further relief as may be appropriate in the circumstances.

Dated this 10th day of April, 1991.

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mbc\

## CERTIFICATE OF SERVICE

I, Marion E. McDougal, do hereby certify that a copy of the foregoing Motion to Accept Late-Filed Comments and Comments of Motion Picture Association of America was mailed, first-class, United States postage prepaid, this 21st day of June, 1991, to the following:

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